

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1483

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

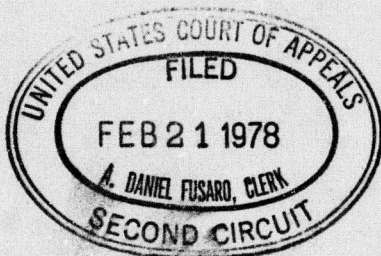
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: UNITED STATES OF AMERICA,
: Plaintiff-Appellee,
: -against-
: NEREIDA HERNANDEZ,
: Defendant-Appellant.
: -----X

Docket No. 77-1483

B P/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether the deadlocked jury's inquiry if knowledge or presence alone constituted proof of participation in a conspiracy required not repetition of the diffuse conspiracy charge but a succinct instruction that participation required an affirmative embracing of the venture's unlawful objectives.

2. Whether the court improperly precluded the defense from establishing that appellant's arrest was illegal and her inculpatory statements tainted, and erroneously upheld the legality of the arrest and the admissibility of the statements without evidentiary support.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) rendered November 11, 1977, after a jury trial, convicting appellant Nereida Hernandez of conspiracy to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) (21 U.S.C. §846). Imposition of appellant's sentence was suspended and, under the Youth Corrections Act, a three-year term of probation was imposed (18 U.S.C. §§3651, 4216, 5010); the court conditioned appellant's probation term upon compliance with the standing order of probation of the district court and upon her participation in a residential narcotic treatment program.

By order of this Court dated December 13, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. Indictment and Pleas of the Co-Defendants

Seven co-defendants were charged with various counts of a 10-count indictment alleging criminal violations of the federal narcotics laws. Edemiro Torres, the ringleader, was charged with conspiracy and eight counts of distributing narcotics;

Carlos Rodriguez, Juan Cruz, Radimus DeJesus, Rafael Pagan, and Carlos Dellafuente were all charged with conspiracy and one or more counts of distributing narcotics, and Dellafuente was additionally charged with possession of a firearm; and appellant Nereida Hernandez, Torres' girlfriend, was charged with a single count of conspiracy.

Prior to trial, Torres, Rodriguez, DeJesus, Pagan, and Dellafuente pleaded guilty to various counts of the indictment in satisfaction of the charges against them. Miss Hernandez was tried, after a suppression hearing, jointly with co-defendant Cruz, before The Honorable Lee P. Gagliardi and a jury.

B. Appellant's Pre-Trial Motion to Suppress

On August 18, 1977, defense counsel submitted a motion to suppress statements; in his affidavit, counsel noted that his motion was being offered just a few days prior to the scheduled trial date because the Government had informed him of its decision to defer prosecution or dismiss the indictment only on August 17. Counsel further stated that his claim of inadequate Miranda warnings was tentative because he had not been advised by the Government whether Miss Hernandez had signed a waiver of rights form. The motion was prepared so hurriedly that there was no opportunity to obtain Miss Hernandez' signature on her affidavit, which had been typed.*

*Appellant's motion to suppress is Document #4 to the Record on Appeal.

On August 22, 1977, the appointed trial date, the court first heard motions, and after the Assistant United States Attorney conceded that Miss Hernandez was entitled to a suppression hearing (H.9*) but before the hearing began (H.17), counsel advised the court:

Your Honor, another branch of the motion to suppress: It is my contention that whether there was coercion in the taking of the statement or not, this defendant was arrested without probable cause, so that even if all the warnings had been given her and she had been treated very kindly, under the Wong Sun doctrine, that of the poisonous tree, any statements resulting from the arrest ought to be suppressed.

(H.10-11).

The court held this claim to be advanced too late to be included in the motion (H.11), and prohibited counsel from inquiring of the arresting officer what had been the basis of the arrest (H.31).

The issues which were presented at the hearing included the claim that arresting agent Ronald Stanley had coerced Miss Hernandez' first statement by advising her that the court would look favorably upon a cooperating defendant and that she would receive consideration at the time of sentence (H.21, 24, 40). Though Stanley denied it, Miss Hernandez testified that the agent had told her she was facing a jail sentence of 15 years (H.38, 91). Stanley surmised that his advice to Miss Hernandez

*Numerical references preceded by "H" refer to pages of the transcript of the pre-trial hearing.

that she would receive consideration at sentencing played a "major part" in her willingness to cooperate (H.50). Miss Hernandez made her inculpatory statements while in Stanley's automobile en route to the United States Attorney's office, in the course of providing Stanley with information and answering his questions about the identities and whereabouts of Torres, DeJesus, Cruz, and Rodriguez (H.21-24). Miss Hernandez made a second statement to Assistant United States Attorney Levites after about three hours of interrogation by Stanley and several other officers (H.43); she agreed to give this written statement because she had been told by an agent that if she did so she would not be required to spend that evening in jail (H.102).*

The court rejected the claim of involuntariness and denied the motion to suppress (H.121). Immediately thereafter, counsel advised the court of his intention to renew his motion to suppress the statements as tainted by the illegal arrest at the conclusion of trial, after facts supporting his position had been adduced (H.122). The court acceded to this procedure at that time (H.122), though it later expressed uncertainty that such evidence would be developed at trial (H.143-144).

**Miss Hernandez was arrested at about noon on June 15, 1977, and was brought before the Assistant United States Attorney late in the afternoon (H.18, 26). She was not arraigned that afternoon or evening because of a backlog; her arraignment was delayed until the following day. She was permitted to proceed home sometime after her statement was given to the Government (H.29, 102).

C. Evidence at Trial

Agent Jose Guzman, an undercover officer assigned to the Drug Enforcement Administration ("DEA") Task Force, met with an informant on April 7, 1977, and proceeded to 640 East 139th Street in the Bronx, where the informant was to introduce Guzman to drug dealer Torres, and Guzman was to purchase an ounce of heroin (T.56-59*). At Apartment 3-H, Torres told Guzman that the heroin was not ready and directed him to return at 11:30 p.m.; Torres and the informant did so, and waited in the hall until Cruz invited them inside (T.59-60, 63-64). There, Guzman observed DeJesus and Rodriguez as well as Torres and Cruz, all of whom were engaged in mixing a white powder (T.65, 68). Guzman purchased an ounce of heroin for \$1,200, which was counted by Torres, Cruz, and Rodriguez (T.70-71). While all this was going on, Miss Hernandez walked into the apartment; she had an argument with Torres and thereafter walked in and out of the living room at various times (T.70-71). Guzman reported that Miss Hernandez spoke with none of those present concerning drugs (T.124).

Guzman returned to the apartment on April 14, 1977, accompanied by Officer Julio Mercado and the informant, and negotiated the purchase of two ounces of heroin for \$2,000 (T.91). Present in the apartment were Torres and DeJesus (T.91). The

*Numerical references preceded by "T" refer to pages of the transcript of the trial proceedings.

agent also returned to the apartment on May 23, 1977, but found nobody home. Upon meeting DeJesus outside the building, Guzman left a message for Torres that he would return the following morning (T.99). While Guzman and Torres were talking, Miss Hernandez walked into the building; Guzman asked DeJesus if she was Torres' wife, and DeJesus indicated that she was (T.99). Miss Hernandez did not speak to Guzman or DeJesus (T.125).

On May 24, 1977, Guzman and Mercado were escorted into the apartment by Torres and, in the living room, Guzman received a sample of heroin in rock form which Torres had retrieved from the bedroom (T.100). At this time, Guzman observed Miss Hernandez, along with another woman and an unidentified man, conversing in the kitchen (T.100). When Guzman asked for a piece of tinfoil in which to wrap the heroin, Torres walked into the kitchen himself to get it (T.101). At one point, Guzman expressed concern that Miss Hernandez might know what was going on and might tell someone about it; Torres called Miss Hernandez to his side and assured Guzman that there was no cause for concern (T.108-109). Guzman recalled:

At that time Nereida Hernandez stated that not to worry about it because Police Officer Mercado and myself, we look like two businessmen and that if anybody should ask her, she will say that we were there to collect insurance. She also stated that it was nothing for us to worry about because she knew exactly what was happening. Edemiro Torres then said that she's my right hand man.

(T.109).

Guzman and Mercado subsequently met with Torres. On about

June 1, 1977, they began discussing a very substantial purchase. On the evening of June 10-11, Torres, with Dellafuente and Pagan, sold approximately 15 kilograms of heroin for \$75,000 to Guzman and Mercado inside Pagan's apartment at 1246 Westchester Avenue in the Bronx (T.101-111, 113, 161). Following the sale, Torres, Dellafuente, and Pagan were arrested (T.114-115). Miss Hernandez was not implicated in this sale, and Guzman had no contact with her after the May 24 conversation. In his various telephone conversations with Guzman, Torres made no reference to Miss Hernandez, and Guzman testified that in all his discussions with Torres and the others actively involved in this drug enterprise, in which the participants spoke of each other, the only mention of Miss Hernandez was DeJesus' May 23 statement to Guzman that she was Torres' wife (T.133, 143-144). Torres provided Guzman with the names of two other women -- a Sylvia Quiles, who lived in Torres' apartment building, and a woman named Eva, who lived in New Jersey -- for purposes of arranging drug transactions or sending messages to Torres when Guzman could not reach him directly (T.130-132, 134).

Miss Hernandez was arrested on June 15, 1977, by Agent Ronald Stanley, for "acting in concert with the others and others selling heroin out of 640 East 139th Street, apartment 3H" (T. 196, 200).*

*When arrested, Miss Hernandez was in possession of a small quantity of cocaine, for which she was not prosecuted.

that she had "assisted in bagging, cutting and selling with Mr. Torres;" that she was "present with Mr. Torres when he had purchased one kilogram of cocaine from a big drug supplier;" that prior to the evening of June 10-11, she had been "introduced to a heroin supplier by the name of Don Raffa by Mr. Torres and that night she knew Mr. Torres was involved in a large drug transaction;" and that she was "expecting Mr. Torres to buy her an automobile after the consummation of that large narcotics deal" (T.202-203). She also related that Torres bought ounce quantities of narcotics and packaged smaller street bags, which he sold from his residence (T.203).*

After Miss Hernandez was interrogated and processed by DEA agents, Stanley took her to the United States Attorney's office, where she was interviewed by Assistant United States Attorney Levites (T.204). During the course of this interrogation, Miss Hernandez stated that "Mr. Torres had tried to keep Ms. Hernandez out of it but that she insisted on packing up heroin for Mr. Torres at 640 East 139th Street, apartment 3H" (T.206-207). Following the interview, Stanley was advised by Mr. Levites that Miss Hernandez would not be able to be arraigned that day because of a backlog of arraignments, and that she would be arraigned the following morning (T.207).**

*Stanley testified, as he had at the pre-trial hearing, that Miss Hernandez' statements followed his discussion with her about the sentencing consideration she would receive for her cooperation (T.200, 217-218).

**Miss Hernandez signed a waiver of arraignment form (T.208).

Miss Hernandez testified that she had been a drug addict with no money, so she moved in with Torres, who supplied her with drugs (T.288). She was aware that Torres dealt in narcotics (T.289-290). She admitted having "handled drugs for Torres" (T.295); the drugs she handled were those Torres gave her for her own use (T.296). This continued until April 8, 1977, when she went into the hospital; thereafter, though she returned to Torres' apartment, she did not handle any of his drugs (T.296). At no time did she assist Torres in his business of drug selling, though she knew what was going on and who the people were who came to Torres' apartment (T.313-314). She recalled that on one occasion -- apparently May 24 -- Guzman and Mercado had raised with Torres the need for precaution as to their dealings, and that Torres assured them that they would be protected under their cover of rent collectors (T.315-316). Miss Hernandez overheard this conversation but was not a party to it, and she made no statements to the undercover officers (T.316-317).

As to her statement to Agent Stanley, Miss Hernandez explained that her admission of having bagged or taped drugs for Torres related exclusively to drugs which were destined to be hers (T.297).* As to her statement to Assistant United States Attorney Levites, she indicated that she had admitted taping or bagging drugs for Torres three or four months ago -- a claim

*She repeated at trial her claim that the statement had been coerced by mention of a 15-year sentence and the promise of consideration by the sentencing judge (T.302-308).

confirmed by Assistant United States Attorney Levites' written reduction of Miss Hernandez' statement;* since her statement to the Assistant United States Attorney was given on June 15, the conduct in question would pertain to the period before she went into the hospital (T.312). Miss Hernandez agreed that in her statement to Mr. Levites, she said that everything she had told the agents was true and that no one was making her say anything (T.337-338).

D. Appellant's Trial Motion to Suppress

After Guzman's testimony, defense counsel renewed his motion to suppress Miss Hernandez' statements on the ground that they were tainted by an illegal arrest. He noted that Guzman's testimony showed that on April 7, 1977, there was no contact between the agents and Miss Hernandez; she was merely present in the apartment (T.166). Counsel further noted that the complaint before the magistrate alleged that Miss Hernandez had sold drugs on that date (T.167). The court, which had agreed at the conclusion of the suppression hearing to entertain a trial motion to suppress on the illegal arrest claim (H.122), declined to consider counsel's arguments and said that it had already ruled (T.167).

Counsel again noted his objection to the arrest during Stanley's testimony (T.199). His efforts to adduce evidence regarding the

*The written statement was admitted in evidence on motion of the defense (T.298-300).

basis for the arrest on cross-examination of Stanley were frustrated when the court repeatedly sustained the Government's objections to his questions about the specific information relied upon for the arrest (T.210-213).

The defense called Agent Joseph Scamardella to prove that the arrest was illegal. Scamardella had been the agent who drafted the complaint alleging Miss Hernandez' role in selling drugs;* the complaint alleged that she had been involved in a sale of 58.6 grams for \$1,500 to an undercover police officer on April 7, 1977. Counsel's contentions that probable cause was lacking, as reflected in the complaint's false allegations, were raised at the conclusion of the Government's case (T.261-262); the court, citing the trial testimony regarding Miss Hernandez' statements to the undercover agents on May 24, held that the arrest was lawful (T.262-263). Counsel's questions of Scamardella, designed to elicit evidence of the complaint and of the basis for the arrest, were objected to and prohibited (T.279-282).

E. Jury Instructions and Verdict

In his pre-charge requests/exceptions, counsel raised a number of points with regard to the court's proposed instructions on Miss Hernandez' participation in the conspiracy. Counsel first noted:

*Technically, the complaint was for the issuance of an arrest warrant, but it was filed at Miss Hernandez' arraignment on June 16, the day after her arrest. The complaint before the magistrate is one of the papers in Document #7 to the Record on Appeal.

At page 43, your Honor has it that the extent of a conspirator's participation is immaterial. I think that cases hold that it's got to be a meaningful participation, by no means one necessarily equal to that of the others, but an active participatory type of behavior rather than an incidental help to someone else. If you open the door of an amount to someone you know is coming in to buy drugs, the mere opening of the door [is not adequate participation].

(T.360-361).

Counsel also requested:

[I]n a case of this type, the mere presence and knowing spectator charge is about as essential as anything, any of the rest of the charge.

... I don't think that there is any reference [in the charge] to someone who is merely present, even if he or she has knowledge of what's going on. I asked also in my request that the Court charge that though a person might have derived an incidental benefit, financial benefit from the doings of another, in this case Torres, that does not visit criminal liability on that person. It's the crux of my defense.

(T.366).

The court declined to adopt the suggested participation language, and stated that its charge* adequately covered "mere presence" (T.361, 366-367). In its conspiracy charge, the court defined conspiracy (T.446-450), discussed membership in the conspiracy (T.450-455), and charged on overt acts (T.455-458). The charge on participation, in relevant part, was as follows:

If you find beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must determine who its members were, and

*The complete text of the court's charge to the jury is reproduced as Appendix C to the separate appendix to appellant's brief.

whether the defendant on trial that you are considering participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

In determining whether a person has become a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purpose. Did that person join with an awareness of at least some of the aims and purposes of the conspiracy?

... [M]ere association with one or more of the conspirators does not make one a member of the conspiracy nor is knowledge without participation sufficient.

What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends.

. . .

The guilt or innocence of a conspirator is not measured by the extent or the duration of that person's participation. Even if that person participated in it to a degree more limited than that of that person's co-conspirators, that person is equally culpable so long as that person was in fact a conspirator.

If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, that person is equally culpable, so long as you find beyond a reasonable doubt that that person was in fact a co-conspirator.

Thus, each member of a conspiracy may perform separate and distinct acts at different times and at different places. Some conspirators may play major roles while others may play minor roles....

(T.450-452).

The jurors began their deliberations at 1:10 p.m., August 25 (T.494). By 5:00 p.m., they had reached a verdict as to the

co-defendant, Cruz: he was found guilty of both conspiracy and the substantive count of selling narcotics (T.514). But the deliberations as to Miss Hernandez appear to have been riddled by doubts concerning her participation in the conspiracy, and deliberations as to her continued for another full day, interrupted with frequent questions from the jurors.

Recognizing that Miss Hernandez' statement to Mr. Levites indicated that she had bagged narcotics prior to the formation of the conspiracy, the jurors asked: "Is it relevant in showing she knew the nature of Torres' operations and her involvement ties her to the continuing conspiracy during the dates mentioned in the indictment?" (T.508-509). Despite the fact that a guilty verdict had been rendered against Cruz on the conspiracy count, the jurors asked twice more to be instructed on the definition of conspiracy -- once just after 5:00 p.m. (T.505, 513, 517-520) and once at 8:35 p.m. (T.541, 544-545). One juror inquired whether the court could accept a "Scotch verdict" (T.522).^{*} And another note asked: "The indictment of Count 1 on Page 1 is broken up into two parts, labeled Numbers 1 and 2. If we find the person guilty of one part, but not the

^{*}The court's response to this was "The verdict must be guilty or not guilty and it must be a unanimous verdict" (T. 522). Counsel's suggestion that the jurors be advised that "not proven" required a not guilty verdict was rejected by the court (T.526-527).

other, does that make the person guilty of Count 1?" (T.534).*

At 9:00 p.m., the jurors sent out their first note indicating a deadlock (T.545-546). Thereupon, the court instructed them on their "duty to deliberate with a view to reaching an agreement..." (T.547). The jurors continued without reaching a verdict, and were sent home at 10:30 p.m. (T.549).

Deliberations were renewed at 9:30 a.m., August 26, and at 11:25 a.m., the jurors requested the reading of Guzman's and Miss Hernandez' testimony regarding Torres' alleged statement that Miss Hernandez was his "right-hand man" (T.552-553), and made the following inquiry: "When Hernandez assured the

*The two paragraphs of the indictment's first count read:

1. From on or about the 1st day of April 1977 and continuously thereafter up to and including the date of the filing of the indictment, in the Southern District of New York ... the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally, and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, to wit, heroin and cocaine, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

Counsel contended that the allegations of both paragraphs must be proved beyond a reasonable doubt if the charge were to be sustained (T.534-535), since the rejection of the allegations of either paragraph would require an acquittal (T.540-541). Instead, the court charged that "Paragraph 2 merely sets forth what the object of the conspiracy is as described in Paragraph 1 of Count 1" (T.542).

policemen (in guise of prospective buyers) that they would be secure when standing in hall or present in buying drugs, did this act establish participation in conspiracy -- facilitating the sale of drugs?" (T.555).* At 1:35 p.m., a note was received which stated: "One of the jurors does not believe that Miss Hernandez said to the officer, 'You have nothing to worry about, I will tell, if asked, you are insurance collectors or rent collectors as you are well-dressed.'" (T.564).** This was followed by a note, received at 2:55 p.m., which stated:

None of the testimony relating to Hernandez' remarks or actions allegedly involving her in the conspiracy is accepted as true by those [or by three] jurors. We have exhausted all our powers of persuasion on both sides. We are deadlocked with no possibility of change in this situation.

(T.569).

Counsel moved for a mistrial (T.569), and strenuously opposed the Government's request for an Allen charge on the ground that any such charge, in these circumstances, would be coercive (T.571-573). The Government suggested the possibility of putting a 4:00 to 4:30 p.m. deadline on deliberations after an

*Counsel requested that this question be answered in the negative, because "a mere acquiescence ... is not sufficiently substantial assistance in a conspiracy" (T.556). The court charged that this was a question for the jury, as the trier of facts, to determine (T.563).

**The court, unsure whether this statement was a credibility finding or a request for confirming testimony, asked the jurors to clarify any request for testimony; the jurors requested no testimony, indicating that the statement represented a credibility finding (T.567-568).

Allen charge (T.572), but the court, after agreeing to give an Allen charge, declined to impose a specific limit (T.573-574). An Allen charge was given, and the jurors retired for further deliberations at 3:10 p.m. (T.575-578).

At 4:20 p.m., the jurors sent in their final note requesting assistance:

If a person, one, possesses knowledge of the facts of the conspiracy or, two, possesses precise knowledge of the participants of a conspiracy or, three, resides in the midst of a criminal operation with or without telling anyone about it, does either of these categories constitute participation in a conspiracy (underlined) under the law?

(T.579-580).

Counsel asked for a "one-word answer ... no," or for an instruction that "if you find those elements alone, then you may not consider the defendant to have been a member of the conspiracy" (T.580-581), but the court elected to reread its charge on conspiracy (with the exception of the overt acts section) in its entirety* -- a charge which included a lengthy discussion on the definition of a conspiracy, which had been given twice previously in full and once in brief, and the entire participation portion of the charge which, inter alia, advised the jurors that "mere association ... does not make one a member of the conspiracy, nor is knowledge without participation sufficient ... the defendant [must] participate with knowledge of at least some of

*The complete text of the court's supplemental charge to the jury is reproduced as Appendix D to the separate appendix to appellant's brief.

the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends" (T.586), but failed to provide a definition of participation in a conspiracy (T. 581-588).^{*} At the conclusion of the rereading, counsel related his objections:

Your Honor, I object to the charge just re-read. It was not responsive to the question, in my judgment, it was overly long, it addressed questions not posed by the note, and furthermore, although, as I understand it, it purported to be a rereading of the conspiracy charge, all of which I don't think was necessary, because what they were concerned about was not conspiracy as a whole, but participation, that's what bothered them, whether this defendant had participated.

(T.589).

At 4:34 p.m., the jurors retired for further deliberations (T.588); at 5:30 p.m., they announced their verdict of guilty (T.592).

^{*}At the conclusion of this supplemental charge, the jurors nodded to the court's inquiry if its instruction responded to the question and did not request further instructions (T.588).

ARGUMENT

Point I

THE DEADLOCKED JURY'S INQUIRY IF KNOWLEDGE OR PRESENCE ALONE CONSTITUTED PROOF OF PARTICIPATION IN A CONSPIRACY REQUIRED NOT REPETITION OF THE DIFFUSE CONSPIRACY CHARGE BUT A SUCCINCT INSTRUCTION THAT PARTICIPATION REQUIRED AN AFFIRMATIVE EMBRACING OF THE VENTURE'S UNLAWFUL OBJECTIVES.

The contention of the defense was that Miss Hernandez was aware of the drug conspiracy and lived amidst its operation but that she had not become a participating member of the conspiracy; and this was confirmed by the weight of the evidence, which established that she was aware and present during a drug transaction but, with the exception of her ambiguous in-custody statements, did not show that she was a participant. The course of the jurors' deliberations reveals that, while the jurors agreed on the existence of a conspiracy, they remained uncertain as to Miss Hernandez' membership in it. On the first day of deliberations, the jury asked to be reinstructed on the definition of conspiracy twice, despite their previous guilty verdict against co-defendant Cruz; the jurors inquired whether they could return a "not proven" verdict; and they revealed their doubts as to the sufficiency of the evidence to establish all the allegations in the indictment. On the second day of deliberations, the jurors asked whether Miss Hernandez' assurance to the undercover agents that they were secure in the building

established her participation; and they indicated, in two successive notes, that several jurors had rejected as untrue all "the testimony relating to Hernandez' remarks or actions allegedly involving her in the conspiracy."*

When the deadlocked jurors submitted their final note asking whether Miss Hernandez' knowledge or presence alone constituted participation in the conspiracy,** they were signaling a misconception which, unless corrected, would jeopardize a fair verdict by averting attention from at least several jurors' conviction that there was no proof beyond presence and awareness. The district court's response to this inquiry, however, failed meaningfully to apprise the jury that the participation it was obliged to find was an affirmative embracing and commitment to the furtherance of the unlawful objectives, an instruction which would have shown participation to entail more than mere knowledge and presence. As a result, a jury which had

*In the course of answering these questions, the court never mentioned the requirements of the participation element. The court's recharge on conspiracy ended before membership was discussed; and even as the pattern of questions revealed that the facts found were limited to Miss Hernandez' knowledge and presence, the court merely encouraged the jurors to reach a decision -- once stating that the sufficiency of the evidence as to participation was for the jury to resolve, once offering to reread testimony, and once giving an Allen charge -- while failing to instruct on the legal requirements of a participation or on the insufficiency of presence or knowledge proof alone.

**The final note read: "If a person, one, possesses knowledge of the facts of the conspiracy or, two, possesses precise knowledge of the participants of a conspiracy or, three, resides in the midst of a criminal operation with or without telling anyone about it, does either of these categories constitute participation in a conspiracy (underlined) under the law?"

been deadlocked over the question of participation for half the deliberation period, which had explicitly rejected major portions of the Government's proof, and which had initially withstood an Allen charge agreed on a guilty verdict in about an hour.

Each of the hypotheses presented in the jurors' final question -- considered separately or together -- stated facts insufficient to satisfy the participation requirement, for each hypothesis described exclusively presence and/or knowledge. This alone cannot establish membership in a conspiracy; participation entails joining the conspiracy with the intention of cooperating in the enterprise and with a commitment to and a stake in the success of the venture. E.g., United States v. DiStefano, 555 F.2d 1094, 1103 (2d Cir. 1977); United States v. Steinberg, 525 F.2d 1126, 1133-1134 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); United States v. Johnson, 513 F.2d 819, 823-824 (2d Cir. 1975); United States v. Baker, 499 F.2d 845, 848 (7th Cir.), cert. denied sub nom. Felts v. United States, 419 U.S. 1071 (1974); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974), cert. denied, 419 U.S. 1056 (1975); United States v. Amato (Brunello), 495 F.2d 545, 548, 549-550 & n.7 (5th Cir.), cert. denied, 419 U.S. 1013 (1974); Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969); United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963).

The jury therefore should have been charged in a fashion which would assure their understanding that the participation

element extended beyond knowledge and presence, and required an "affirmative embracing of the unlawful objectives," United States v. Guillette, 547 F.2d 743, 751 (2d Cir. 1976). The simple "no" answer to the jury's question originally suggested by defense counsel would have been appropriate; for there was no ambiguity in the question and, under the above authorities, the answer to the three hypotheses, individually as well as collectively, was "no." (Cf. United States v. Pellegrino, 470 F.2d 1205, 1208-1209 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973).) But if a more discursive response was preferable, as the district court contended, the supplemental charge would have had to convey the correct standard of participation in a responsive and effective manner. United States v. Guillette, supra, 547 F.2d at 750-751 & n.5; see United States v. Brown, 544 F.2d 1155, 1159 (2d Cir. 1976).

The court's lengthy rereading of the original conspiracy charge was not responsive or effective. In the course of a supplemental instruction which consumed eight pages of transcript, the court never explained what conduct constituted participation in a conspiracy. Though there was one brief reference to the requirement that "the defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends" (T.586), this was not responsive to the jury's question, which displayed a confusion as to what acts were necessary to establish participation and which required a

direct definition of participation. The court's statement was accurate, but did not equip the jurors with the information they needed to decide whether the facts they had found proved participation.

Moreover, the court's supplemental instruction did not focus on the issue which was the subject of the jury's inquiry. The tack of rereading the entire charge on the definition of conspiracy and membership in a conspiracy subjected the jurors to an unnecessarily lengthy instruction, with such great attention to matters irrelevant to the point in issue that the one material statement made could only be lost on the exhausted jurors. Cf. United States v. Persico, 349 F.2d 6, 8 (2d Cir. 1965); see also Lacaze v. United States, 391 F.2d 516, 521 (5th Cir. 1968). The jurors' question was perfectly focused on a specific issue -- participation; this mandated that the judge, in discharging his "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria," do so with "concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-613 (1946); see United States v. Petersen, 513 F.2d 1133, 1135-1136 (9th Cir. 1975); cf. United States v. Marquez, 424 F.2d 236, 240 (2d Cir.), cert. denied, 400 U.S. 828 (1970). The District of Columbia Circuit made the following observations in an analogous situation, United States v. Bolden, 514 F.2d 1301, 1307-1308 (D.C. Cir. 1975):

[W]e would ordinarily be hard-pressed to find plain error in the court's instruction to the jury, which was essentially a reading

of the statute. What makes this case different is that the jury, itself, focused its attention on the timing problem, and indicated to the court that it was confused about exactly this issue....

... When the court refused to do anything more than reread the statute and the standard instruction, despite cogent requests from the jury and both the government and defense counsel, it could well have left the jury with the incorrect impression that coincidence was sufficient to convict. The standard instruction may be sufficient in the first instance on this issue ... but the jury's request called for a further explication of the law on this point.

The deficiency in the supplemental charge in question is further evident upon comparison with that given in United States v. Guillette, supra, 547 F.2d at 750-751. In that case, this Court upheld the supplemental charge after "view[ing] the contested jury instructions in the context of the total charge," id. at 750, and finding sufficient "clarification of the elements of culpable participation ... [in the instruction that] a co-conspirator 'must in some way indicate or show that he is going along with this (conspiracy), that he is in on it, that he is part of this arrangement, that he adopts this plan as his own and that he is going to promote it ... as his own, and that he has a stake in the outcome,'" id. at 750-751. The detail as to the requisites of participation reflected in these remarks is, alone, distinction enough to pale the supplemental remarks in the case at bar. But the distinctions go beyond the presence of these few words; in Guillette, the district court's original charge on participation communicated, more effectively than any statement in the case at bar, the act of joining a conspiracy (compare id. at

750 n.5 with T.450-452), and the supplemental charge on participation was brief, directly responsive, not merely reiterative, and exclusively relevant. Not only did the Guillette jurors receive instructions which ensured their understanding that membership entails the affirmative embracing of the venture and that mere knowledge is not sufficient (id. at 751), but they were not further confused and misled by a supplemental charge which stressed matters extraneous to the question raised.

Whether or not the court's original charge was adequate on the question of participation, and whether or not the court's denial of the two defense requests to charge concerning "meaningful participation" and "mere presence and knowledge" was proper at that pre-deliberation stage are debatable matters which need not be resolved here. For once it became apparent that the issue upon which the deliberations had focused was participation and that the jurors suffered a misconception as to the sufficiency of knowledge and presence evidence alone, it was incumbent upon the court to define participation -- as an embracing of or commitment to or stake in the criminal venture -- so that the jury could recognize that knowledge, presence, acquiescence, or approval did not constitute participation. While it may not be discernible whether a proper answer to the jurors' final inquiry would have resulted in a maintenance of the deadlock or in an acquittal, it is certain that, with an effective instruction, this jury would not have issued a verdict of guilty.

Point II

THE COURT IMPROPERLY PRECLUDED THE DEFENSE FROM ESTABLISHING THAT APPELLANT'S ARREST WAS ILLEGAL AND HER INCULPATORY STATEMENTS TAINTED, AND ERRONEOUSLY UPHELD THE LEGALITY OF THE ARREST AND THE ADMISSIBILITY OF THE STATEMENTS WITHOUT EVIDENTIARY SUPPORT.

At both the suppression hearing and trial, the defense was denied any meaningful opportunity to present its claim that Miss Hernandez' statements had been tainted by an illegal arrest. The court's ultimate ruling that the arrest was valid was entered without benefit of defense proof on the subject, and arbitrarily relied on facts which were not shown to have played any part in the decision to arrest Miss Hernandez. It is impossible to establish the illegality of the arrest on the basis of this record, but the defense claim does not appear to lack substance. To have barred this claim as untimely when it was raised prior to the suppression hearing and at a time reasonable in light of the circumstances was an uncommon abuse of discretion.

In Jones v. United States, 362 U.S. 257, 264 (1960), the Court described the judicial function in hearing and deciding motions to suppress as "carrying out an important social policy and not a narrow, finicky procedural requirement." Despite minor alterations in the procedural rules governing motions to suppress, the Court's observation remains vital. In the case

at bar, the district court employed a procedural rule in an arbitrary and "finicky" manner to frustrate the determination of whether Miss Hernandez' inculpatory statements were tainted by illegal Government conduct. Under all the attendant circumstances, this was an abuse of discretion.

Despite the fact that the claim was fully asserted before the hearing, the defense was barred from proving that Miss Hernandez had been arrested illegally because the initial pre-trial motion to suppress failed to advance this specific claim. While the late assertion of this claim would come within the waiver provision of F.R.Cr.P. 12(f), distinctions in the precise timing of a late motion are relevant to the "cause shown" clause of Rule 12(f). Failure to assert a claim at any time in the district court unequivocally warrants waiver. See United States v. Braunig, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977); United States v. Schwartz, 535 F.2d 160, 163 (2d Cir.), cert. denied, 423 U.S. 1054 (1976). Failure to assert a claim prior to trial in the district court is less serious, but still warrants waiver when the cause for delay is negligence rather than unavailability of facts. See United States v. Mauro, 507 F.2d 802, 806-807 (2d Cir. 1974), cert. denied, 420 U.S. 991 (1975); United States v. Sisca, 503 F.2d 1337, 1347-1348 (2d Cir.), cert. denied, 419 U.S. 1008 (1974); United States v. Blackwood, 456 F.2d 526, 529 (2d Cir.), cert. denied, 409 U.S. 863 (1972). But failure to assert a claim by the pre-trial motion date set by the district court pursuant

to F.R.Cr.P. 12(c) is a far less serious procedural infraction, for this form of late filing does not preclude the district court's consideration, nor does it necessitate an interruption of trial. See United States v. Mauro, supra, 507 F.2d at 806. There are valid concerns which justify compliance with court-set deadlines for pre-trial motions, such as court schedules and possible prejudice to the Government; but before failure to comply with a Rule 12(c) deadline is invoked to cause surrender of a constitutional claim, some such concern should be present.

In the case at bar, neither the court nor the prosecution advanced any such ground. The court could not have found that addition of this claim to the motion would interfere with its calendar, since it had just ordered a hearing on the other defense claims relating to suppression of the statement. And the prosecuting assistant did not argue prejudice, and offered an informal objection only after the court had ruled the claim to be barred from the hearing. No interest was served by the court's preclusion of this aspect of the defense motion; this was procedure for procedure's sake.

On the other hand, defense counsel had proffered grounds for the delay in his motion which established sufficient cause to merit relief from waiver. Miss Hernandez had been arraigned before a magistrate just three weeks prior to the scheduled trial date, and it was not until August 17, 1977 -- less than a week before the trial date -- that the Government declined

to defer prosecution. Furthermore, counsel noted in his written motion filed August 18 that information relating to any written waiver of rights, requested from the Government several weeks previously, had not been forthcoming. Under these circumstances, the lateness of the illegal arrest claim should have been excused under the "cause shown" provision of Rule 12(f).

But if the district court acted within its discretion in barring this issue from the hearing on the motion to suppress, it acted unreasonably in prohibiting the defense from proving the arrest to have been illegal upon the renewed motion to suppress at trial. Though there is no obligation to reconsider every suppression motion at trial after a decision at the pre-trial hearing, a trial court may do so (Cogen v. United States, 278 U.S. 221, 224 (1929); Gouled v. United States, 255 U.S. 298, 312-313 (1921); Pendergrast v. United States, 416 F.2d 776, 782 (D.C. Cir.), cert. denied, 395 U.S. 926 (1969); Anderson v. United States, 352 F.2d 945, 947 (D.C. Cir. 1965)). And in certain circumstances, reexamination of the matter may be the trial court's duty, as when "[n]ew facts, new light on the credibility of government witnesses, or other matters appearing at trial may cast reasonable doubt on the pretrial ruling" (Rouse v. United States, 359 F.2d 1014, 1016 (D.C. Cir. 1966)), or when a fact-finding hearing on a claim has not been held and new facts are discovered (United States v. Richardson, 291 F.Supp. 441, 443 (S.D.N.Y. 1968)). As the Supreme Court noted in DiBella v. United States, 369 U.S. 121, 129 (1962): "[T]he legality of

the search too often cannot be truly determined until the evidence at trial has brought all circumstances to light."

The district court recognized these principles when it agreed to entertain the defense motion to suppress, on the ground of illegal arrest, at trial; but it rendered this opportunity meaningless when it blocked counsel's efforts to adduce evidence in support of the claim. This was to be the type of new evidence which warrants reconsideration of the motion to suppress: facts which had not been presented at the suppression hearing, facts which raised questions as to the conduct of the Government's agents, facts which related to a significant constitutional claim. Once the Government's evidence at trial showed that Miss Hernandez had no part in the April 7 transaction, counsel should have been permitted to explore that proof establishing that her arrest had resulted exclusively from allegations as to her conduct on that date. Once the court had agreed to pass on this suppression claim at trial, as it should have, and once some trial evidence had shown this to be an issue worthy of consideration, as it did, the court should have allowed counsel sufficient latitude to bring "all circumstances to light." DiBella v. United States, supra, 369 U.S. at 129 (emphasis added).

Though the record as it now exists does not permit a final determination of the illegal arrest and taint claims, several facts demonstrate that this was and is a matter worthy of further hearing. Scamardella's complaint before the magistrate

alleged that Miss Hernandez had sold drugs to undercover officers on April 7, 1977. This would appear to be the information upon which Stanley acted in arresting Miss Hernandez, since Stanley presented no facts in support of the arrest and since the complaint was dated the day after Miss Hernandez' arrest. The probable cause question, therefore, turns on the quality of the same information -- the facts alleged in Scamardella's complaint. See Whiteley v. Warden, 401 U.S. 560, 568 (1971); United States ex rel. Mungo v. LaVallee, 522 F.2d 211, 214 (2d Cir. 1975), vacated on other grounds, 428 U.S. 907 (1976).

While the complaint stated factors which, on their face, were adequate to establish probable cause, the truthfulness of these facts is open to serious question. The complaint alleged that Miss Hernandez sold heroin on April 7; not only did the Government's proof show that Miss Hernandez had nothing to do with any drug transaction on April 7, but it demonstrated that Miss Hernandez was not connected, by fact or innuendo, with drug peddling on any date. Moreover, the complaint alleged that the drug sale on April 7 involved 58.6 grams of heroin sold for \$1,500; but Guzman, who checked the weight of the April 7 purchase with his own scale, was certain that he bought one ounce of heroin -- 58.6 grams is equivalent to about two ounces -- and testified that the purchase price was \$1,200. These misstatements of fact are too substantial to be dismissed as mere mistakes; recalling the arresting

agent's avid questioning of Miss Hernandez immediately after her arrest to obtain information concerning the identities and whereabouts of three persons associated with Torres' drug business, this arrest may have been a pretense for questioning Miss Hernandez. In United States v. Gillette, 383 F.2d 843, 848 (2d Cir. 1967), this Court stated:

Although we have repeatedly stated that "outright perjury by government agents is not a common occurrence," [citation omitted], we by no means foreclose the possibility that, in the appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face.

See also Rugendorf v. United States, 376 U.S. 528, 531-532 (1964) (Supreme Court there assumes that attack might be made against search warrant valid on its face); United States v. Halsey, 257 F.Supp. 1002, 1005-1006 (S.D.N.Y. 1966) (Frankel, J.). Analogously, an attack on the information underlying Stanley's arrest of Miss Hernandez as perjured might demonstrate that this arrest was illegal.

If such were the case, Miss Hernandez' statements to Stanley and subsequently to Assistant United States Attorney Levites may have been tainted by the illegal arrest -- "come at by exploitation of that illegality." Wong Sun v. United States, 371 U.S. 471, 488 (1963); see United States v. Lucchetti, 533 F.2d 28, 37 (2d Cir.), cert. denied, 429 U.S. 849 (1976).*

*In addition, if the taint were to reach only to the statements made to Stanley, Miss Hernandez' statements to Mr. Levites may nevertheless be vulnerable under United States ex rel. Stephen J.B. v. Shelly, 430 F.2d 215, 218-219 (2d Cir. 1970).

Those facts developed on the record suggest that Miss Hernandez' statements were so closely intertwined with her arrest as to be poisoned by its illegality; for following her arrest, she was interrogated immediately and persistently with no break until after she made her statement to Assistant United States Attorney Levites. See Wong Sun v. United States, supra, 371 U.S. at 485-486.

Miss Hernandez' statements, despite distinct ambiguities, described conduct which might be interpreted as participation. This was the sole source of such proof; Guzman's testimony regarding his May 24 conversation with Torres and Miss Hernandez, in addition to being explicitly rejected by several members of the jury, proved Miss Hernandez' awareness rather than her participation. Absent Miss Hernandez' statements, the Government's proof would have been insufficient as a matter of law. The preclusion of defense proof at the pre-trial hearing and at trial, offered to establish the statements to be constitutionally infirm, was significant error, and a hearing should be ordered on the question of the illegality and taint of the arrest.

CONCLUSION

For the foregoing reasons, appellant should be granted a new trial, preceded by a suppression hearing on the legality of her arrest.

Respectfully submitted,

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